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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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9 Alan Ripa,

10 Plaintiff,

11 v.

12 Federal National Mortgage Association,
13 Wells Fargo & Company, Wells Fargo NA,
14 Unknown Defendants 1-100, Unknown
15 Third Party Defendants 1-100,

16 Defendants.

No. CV-13-01612-PHX-DGC

ORDER

17 Defendants Wells Fargo Bank, N.A. and Federal National Mortgage Association
18 (“Fannie Mae”) have filed a motion to dismiss pursuant to Rules 8(a), 9(b) and 12(b)(6)
19 of the Federal Rules of Civil Procedure. Doc. 11. The motion is fully briefed and no
20 party has requested oral argument. For the following reasons, the Court will grant the
21 motion.¹

I. Background.

22 Plaintiff Alan Ripa obtained a \$137,600 loan from Bank One in December 2002
23 (the “Loan”). Doc. 11 at 1. The Loan was secured by real property located at 6732 E.
24 Latham Street, Scottsdale, Arizona. *Id.* Bank One later assigned the Deed of Trust to
25 another party and that party assigned the Deed of Trust to Wells Fargo. *Id.* at 2. On
26 October 2, 2009, Wells Fargo appointed Michael A. Bosco, Jr. as successor trustee. *Id.*

27 ¹ Plaintiff’s response to the motion fails to comply with the font and type size
28 requirements of LRCiv 7.1(b). Plaintiff shall comply with all local rules in his future
filings.

1 Plaintiff defaulted on his repayment obligations several times, and each time Mr. Bosco
 2 recorded a Notice of Trustee's Sale. *Id.* Plaintiff's property was sold at a trustee's sale
 3 on September 10, 2010, but that sale was nullified due to error. *Id.*

4 Plaintiff alleges that he sought loan modification services but "encountered
 5 persistent incompetent responses." Doc. 1-1, ¶ 17. He contends that Wells Fargo's
 6 attempts to foreclose were "illegal," and that foreclosure was pursued on an "illegal dual
 7 track" while he was seeking loan modification. *Id.*, ¶¶ 17, 22, 24-25. He also asserts that
 8 the foreclosure on September 10, 2010, was wrongful and illegally deprived him of his
 9 home for more than one year, during which time it was vandalized. *Id.*, ¶¶ 18-22.
 10 Additionally, Plaintiff alleges that Wells Fargo is party to a 2012 consent judgment
 11 entered in *United States of America, et al. v. Bank of America* ("Consent Judgment"), that
 12 contains promised "conduct remedies" upon which he relied. *Id.*, ¶ 13.²

13 Plaintiff asserts fourteen claims against Wells Fargo, Fannie Mae and other
 14 defendants, including: (1) violation of A.R.S. § 44-1522 by conduct, (2) violation of
 15 A.R.S. § 44-1522 by omission, (3) breach of contract, (4) violation of A.R.S. Title 31,
 16 Chapter 6.1, (5) negligent misrepresentation, (6) fraudulent concealment, (7) failure to
 17 hire, train or supervise employees, (8) breach of Consent Judgment, (9) constructive
 18 fraud, (10) equitable estoppel, (11) promissory estoppel, (12) violation of the duty of
 19 good faith and fair dealing, (13) common law fraud, and (14) wrongful foreclosure.

20 **II. Legal Standard.**

21 **A. Rule 8(a).**

22 Rule 8(a)(2) requires that a pleading "contain a short and plain statement of the
 23 claim showing that the pleader is entitled to relief[.]" *See* Fed. R. Civ. P. 8(a)(2); *Porter*
 24 *v. Jones*, 319 F.3d 483, 494 (9th Cir. 2003). "[A] complaint generally must satisfy only
 25 the minimal notice pleading requirements of Rule 8(a)(2)." *Id.*

26
 27 ² Plaintiff also alleges that Wells Fargo is subject to a "Consent Order entered
 28 before the Board of Governors of the Federal Reserve System" in 2011. Doc. 1-1, ¶ 8.
 Plaintiff does not attach a copy of this order or allege any of its specific provisions. As
 such, the Court does not consider it.

1 **B. Rule 9(b).**

2 Rule 9(b) requires that a plaintiff alleging fraud or mistake “state with particularity
3 the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). Rule 9(b) has
4 been interpreted by the Ninth Circuit to require the pleader to “state the time, place, and
5 specific content of the false representations as well as the identities of the parties to the
6 misrepresentation.” *Schreiber Distrib. Co. v. Serv-Well Furn. Co.*, 806 F.2d 1393, 1401
7 (9th Cir. 1986). The plaintiff must also “set forth . . . an explanation as to why the
8 disputed statement was untrue or misleading when made.” *Yourish v. Cal. Amplifier*, 191
9 F.3d 983, 993 (9th Cir. 1999); *see also Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097,
10 1103 (9th Cir. 2003) (“Averments of fraud must be accompanied by the who, what,
11 when, where, and how of the misconduct charged.”).

12 **C. Rule 12(b)(6).**

13 When analyzing a complaint for failure to state a claim to relief under
14 Rule 12(b)(6), the well-pled factual allegations “are taken as true and construed in the
15 light most favorable to the nonmoving party.” *Cousins v. Lockyer*, 568 F.3d 1063, 1067
16 (9th Cir. 2009) (citation omitted). Legal conclusions couched as factual allegations “are
17 not entitled to the assumption of truth,” *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009), and
18 therefore ““are insufficient to defeat a motion to dismiss for failure to state a claim,”” *In*
19 *re Cutera Sec. Litig.*, 610 F.3d 1103, 1108 (9th Cir. 2010) (citation omitted). To avoid a
20 Rule 12(b)(6) dismissal, the complaint must plead “enough facts to state a claim to relief
21 that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This
22 plausibility standard “is not akin to a ‘probability requirement,’ but it asks for more than
23 a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678
24 (quoting *Twombly*, 550 U.S. at 556). “[W]here the well-pleaded facts do not permit the
25 court to infer more than the mere possibility of misconduct, the complaint has alleged –
26 but it has not ‘show[n]’ – ‘that the pleader is entitled to relief.’” *Id.* at 679 (quoting Fed.
27 R. Civ. P. 8(a)(2)).
28

III. Analysis.

A. Fraud Claims (Counts One, Two, Five, Six, Nine, and Thirteen).

Plaintiff has asserted several fraud-related claims including violations of Arizona's Consumer Fraud Act (A.R.S. § 44-1522) by conduct and omission, negligent misrepresentation, fraudulent concealment, constructive fraud, and common law fraud. *See* Doc. 1-1, ¶¶ 31-36, 43-46, 47-49, 56-58, 68-70. Although each of these claims has unique elements, they share one common requirement – each must be pled with particularity as required by Rule 9(b). *See Silving v. Wells Fargo Bank, NA*, 800 F. Supp. 2d 1055, 1075 (D. Ariz. 2011) (noting that a plaintiff must plead a claim under Arizona's Consumer Fraud Act with particularity); *Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003) (“It is well established in the Ninth Circuit that both claims for fraud and negligent misrepresentation must meet Rule 9(b)’s particularity requirements.”); *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 663 (9th Cir. 1999) (requiring that a state law claim for fraudulent concealment be pled with particularity under Rule 9(b)); *Vess*, 317 F.3d at 1106 (9th Cir. 2003) (“It is established law, in this circuit and elsewhere, that Rule 9(b)’s particularity requirement applies to state-law causes of action.”).

Plaintiff pleads four instances of false statements or misrepresentations: (1) “Defendants” falsely promised to provide loan modification services in a fair and legal manner (Doc. 1-1, ¶ 15); (2) “Defendants falsely told [him] they had lost all of his documents” (*Id.*, ¶ 16); (3) on September 9, 2010, “Defendants” acknowledged that he “had made all required payments, and executed all accurate documents,” and told him “the loan modification was still in process,” while “conceal[ing] the fact that they had illegally pursued foreclosure” (*Id.*, ¶ 17); and (4) between September 2010 and December 2010, Wells Fargo told him that the trustee’s sale was rescinded and his home had not been sold (*Id.*, ¶ 19-20).³

³ Many of Plaintiff’s allegations refer generally to “Defendants” and do not specify to which of the several defendants in the case he is referring.

1 Plaintiff has failed to plead these fraud claims with particularity. With the
2 exception of the fourth statement, Plaintiff does not identify which of the multiple
3 defendants named in the Complaint made the alleged false statements. *See Schreiber*,
4 806 F.2d at 1401. For the fourth statement, Plaintiff states that Wells Fargo falsely told
5 him that the trustee's sale held on September 10, 2010, was rescinded and that his home
6 was not sold. Doc. 1-1, ¶ 20. Although this paragraph does identify a specific defendant,
7 Plaintiff still has failed to identify the person who made the alleged false statement, when
8 or where it was made, or why it was untrue or misleading. *See Yourish*, 191 F.3d at 993.

9 Plaintiff's complaint contains other fatal errors with respect to Count Nine. Under
10 Arizona law, a relationship "akin to a fiduciary relationship must exist" for a constructive
11 fraud cause of action to arise. *McAlister v. Citibank*, 171 Ariz. 207, 214 (Ct. App. 1992).
12 Plaintiff appears to contend that such a relationship exists here, "arising from the initial
13 loan origination, the relationship between the parties, the parties joint venture at avoiding
14 foreclosure . . . , the Arizona statutes . . . [and] the 2012 Consent Judgment[.]" Doc. 1-1,
15 ¶ 57. Plaintiff is incorrect. Neither Arizona law nor the Consent Judgment provides that
16 a fiduciary relationship exists between lenders and mortgagors. *See Valley Nat'l Bank of*
17 *Phoenix v. Elect. Dist. No. 4*, 90 Ariz. 306, 316 (1961) ("[T]he relationship between a
18 Bank and an ordinary depositor, absent any special agreement, is that of debtor and
19 creditor."); *McAlister*, 171 Ariz. at 214; *Urias v. PCS Health Sys.*, 211 Ariz. 81 (Ct. App.
20 2005) (holding that a debtor/creditor relationship does not create a fiduciary duty).
21 Further, contractual relationships alone do not give rise to fiduciary duties. *Cook v.*
22 *Orkin Exterminating Co.*, 227 Ariz. 331, 334 (Ct. App. 2011) ("[C]ommercial
23 transactions do not create a fiduciary relationship unless one party agrees to serve in a
24 fiduciary capacity."). Plaintiff has not alleged that either Defendant ever agreed to serve
25 in a fiduciary capacity.

26 Further, Plaintiff's contention that a fiduciary relationship existed as a result of a
27 "joint venture at avoiding a foreclosure" is entirely without merit. A joint venture exists
28 "when two or more parties agree to pursue a particular enterprise in the hope of sharing a

1 profit.” *Ellingson v. Sloan*, 22 Ariz. App. 383, 386 (1974). Plaintiff does not allege any
 2 facts to support the existence of an agreement to share profits in pursuit of avoiding
 3 foreclosure.

4 Because Plaintiff has failed to plead his fraud claims with particularity and has not
 5 pled facts demonstrating a fiduciary relationship with Defendants, the Court will dismiss
 6 Counts One, Two, Five, Six, Nine, and Thirteen.

7 **B. Contract Claims (Counts Three and Twelve).**

8 Plaintiff asserts two contract claims: (1) breach of contract, and (2) breach of the
 9 duty of good faith and fair dealing. A breach of contract claim contains three elements
 10 under Arizona law: (1) the existence of a contract, (2) its breach, and (3) resulting
 11 damages. *Graham v. Asbury*, 112 Ariz. 184, 185 (1975). Arizona law implies a duty of
 12 good faith and fair dealing in every contract, which prohibits either party from acting to
 13 “impair the right of the other to receive benefits which flow from their agreement or
 14 contractual relationship.” *Rawlings v. Apodaca*, 151 Ariz. 149, 153 (1986). Parties may
 15 “breach [the] duty of good faith without actually breaching an express covenant in the
 16 contract.” *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No.*
 17 *395 Pension Trust Fund*, 201 Ariz. 474, 491 (2002).

18 Plaintiff’s complaint states:

19 The documents developed by the parties in the origination of the loan and
 20 mortgage which are the subject of this litigation were incorporated into a
 21 mortgage note, a deed of trust and other contracts, and include promises as
 22 to loss mitigation, loan modification, payment, collection, and foreclosure,
 23 which both parties understood to be subject to modification as required by
 economic circumstances.

24 Doc. 1-1, ¶ 38.

25 This paragraph refers to the loan origination contract between the parties. That
 26 contract, embodied in the Note and Deed of Trust, is the only contract specifically
 27 identified in the complaint. Plaintiff does not explain, however, how the actions of
 28 Defendants breached the Note and Deed of Trust. Indeed, Plaintiff makes reference to

1 the Deed of Trust only once in his Complaint and has neither attached a copy nor
2 identified any relevant sections. Plaintiff does not allege any particular breach of that
3 contract, nor does he allege any benefit under that contract that was impaired. Plaintiff
4 does allege generally that “Defendants” made false statements and concealed information
5 from him, but nothing in the Deed of Trust guarantees Plaintiff the right to receive
6 truthful information about the loan modification process.

7 Plaintiff alleges “he was able to receive loan modification” (Doc. 1-1, ¶ 17), and
8 that Wells Fargo “proposed loan modification and offer of settlement” (*Id.*, ¶ 23), but he
9 does not allege any agreement was ever executed and fails to plead any factual
10 allegations setting out the terms of any such agreement. Further, as the Court will discuss
11 below, Plaintiff is not a party to the Consent Judgment and therefore does not have the
12 right to receive any benefits from that agreement or pursue any action for breach of the
13 agreement.

14 Finally, Plaintiff contends that “a promise of future conduct by either or both
15 parties will support a contract, or a novation.” Doc. 13 at 12. Plaintiff cites no authority
16 to support this assertion, nor does he identify the alleged contract that contains this
17 promise of future conduct. Plaintiff has not pled facts sufficient to establish any of the
18 elements of a breach of contract claim. Nor has he stated a claim that either Defendant
19 breached the duty of good faith and fair dealing with regard to any contract. The Court
20 will therefore dismiss Counts Three and Twelve.

21 **C. Violation of A.R.S. Title 33 Chapter 6.1 (Count Four).**

22 Chapter 6.1 of Title 33 of the Arizona Revised Statutes contains several sections
23 related to Deeds of Trust. The chapter covers everything from appointing successor
24 trustees to the disposition of proceeds from a trustee’s sale. *See* A.R.S. § 33-801 et seq.
25 Plaintiff does not specify what section of Chapter 6.1 Defendants violated. The Court
26 cannot determine whether Plaintiff has adequately pled the elements of a cause of action
27 where Plaintiff has not specified which cause of action he is attempting to bring.
28 Although Plaintiff contends in his response that “NO notices required in (sic) by A.R.S. §

33-807.01 were ever sent” (Doc. 13 at 13), this allegation does not appear in Plaintiff’s complaint and cannot salvage Plaintiff’s claim. Plaintiff has failed to state a claim under Title 33, Chapter 6.1 of the Arizona Revised Statutes. Accordingly, Count Five is dismissed.

D. Failure to Hire, Train, or Supervise (Count Seven).

Arizona law does not provide a claim for failure to hire. *See Burris v. City of Phoenix*, 179 Ariz. 35, 43 (Ct. App. 1993) (noting that “no state or federal court has recognized the tort of wrongful failure to hire”). Plaintiff cites no case law that would support such a claim on the facts of this case.

An employer’s liability for “negligent hiring, retention, or supervision of an employee” depends on whether a court “first finds that the employee committed a tort.” *Kuehn v. Stanley*, 208 Ariz. 124, 130 (Ct. App. 2004). Plaintiff neither alleges that any individual employee of Wells Fargo or Fannie Mae committed a tort, nor how Defendants were negligent in hiring, training, or supervising such an employee. Plaintiff has failed to state a claim for negligent hiring, retention, or supervision of an employee and the Court will therefore dismiss Count Seven in its entirety.

E. Violation of Consent Judgment (Count Eight).

Plaintiff attaches to his Complaint and incorporates by reference a copy of the Consent Judgment entered into by Wells Fargo, the United States, fifty states, and the District of Columbia, as well as a separate document called Enforcement Terms. Doc. 1-2. The Court will consider these documents on the Motion to Dismiss without converting it to a motion for summary judgment because they are attached to the Complaint and incorporated by reference. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

Although Plaintiff relies heavily on the Consent Judgment as a basis for his claims, enforcement of the Consent Judgment is expressly limited to the parties. Doc. 11-16 at E-14-E-15, ¶¶ J-1, J-2 (noting that “[a]n enforcement action under [the] Consent Judgment may be brought by any Party . . . or the Monitoring Committee.”). Plaintiff is not a party to the Consent Judgment and accordingly cannot enforce it against

Defendants. Plaintiff contends in his brief that the section of the Consent Judgment titled “Enforcement Action” allows him to bring an action to enforce the terms of the Consent Judgment. Doc. 13 at 6. But that section provides Plaintiff with no right of enforcement. It merely states that “[n]othing in this Section shall limit the availability of remedial compensation to harmed borrowers as provided in Section E.5[.]” *Id.* Section E.5 does not give Plaintiff the right to sue to enforce the Consent Judgment. *See* Doc. 11-16 at E-12, ¶ E-5. As a result, the Court will dismiss Count Eight.⁴

F. Equitable and Promissory Estoppel (Counts Ten and Eleven).

Equitable estoppel requires “an affirmative misrepresentation of a present fact or state of facts and detrimental reliance by another thereon.” *Tiffany Inc. v. W. M. K. Transit Mix, Inc.*, 16 Ariz. App. 415, 419 (1972). It is generally “available only as a defense, while promissory estoppel can be used as a cause of action for damages.” *Id.* Arizona courts have treated claims for equitable estoppel as claims for promissory estoppel where plaintiffs have adequately alleged the elements of promissory estoppel. *Gorman v. Pima Cnty*, 230 Ariz. 506, 510 n.4 (Ct. App. 2012). “The critical distinction between the two is that equitable estoppel refers to reliance on a misrepresentation of some present or past fact, whereas ‘promissory estoppel rests upon a promise to do something in the future.’” *Id.* (internal citation omitted). Aside from that difference, “promissory estoppel includes all elements of equitable estoppel.” *Id.*

Estoppel contains three elements: “(1) the party to be estopped commits acts inconsistent with a position it later adopts; (2) reliance by the other party; and (3) injury to the latter resulting from the former’s repudiation of its prior conduct.” *Id.* at 510-11. Plaintiff alleges that he “relied and acted upon [] false facts and concealment to his detriment and was damaged thereby[.]” Doc. 1-1, ¶ 61. The only factual allegations in the Complaint that set out inconsistent acts are in Paragraphs 17 and 18, where Plaintiff alleges he was told by “Defendants” on September 9, 2010 that his loan modification was

⁴ Plaintiff’s response contains a lengthy discussion of federal preemption. Doc. 13 at 3-5. This discussion appears to have no relation to the issues in this case, and the Court does not consider it.

1 still in process and that all required payments were made, and his home was then sold at a
2 trustee's sale the following day. *Id.*, ¶ 17-18. But Plaintiff does not specify which of the
3 multiple defendants is responsible for this alleged inconsistent act.

4 Plaintiff alleges that Defendants made several promises concerning the Consent
5 Judgment. *Id.*, ¶¶ 10, 13, 15. Plaintiff also alleges that he received "various commercial
6 communications . . . by Defendants promising loss mitigation services consisting of loan
7 modification and foreclosure prevention, and falsely promising that said services would
8 be provided in a fair and legal manner[.]" *Id.*, ¶ 15. Any promises contained in the
9 Consent Judgment were not made to Plaintiff and cannot form the basis for a promissory
10 estoppel claim. *See Higginbottom v. State*, 203 Ariz. 139, 144 (Ct. App. 2002)
11 ("[Plaintiff] can only recover under the theory of promissory estoppel if he had a
12 'justifiable right to rely' on the alleged promise.") (citing *Trollope v. Koerner*, 106 Ariz.
13 10, 18 (1970)). As to the purported promises made in "various commercial
14 communications," Plaintiff does not identify which of the multiple defendants made the
15 alleged promises, and thus the Court cannot determine whether any later inconsistent acts
16 occurred. Accordingly, the Court will dismiss Counts Ten and Eleven.

17 **G. Wrongful Foreclosure (Count Fourteen).**

18 Plaintiff alleges that his home was sold "in violation of the 2011 Order, Arizona
19 statute and common law." Doc. 1-1, ¶ 72. As discussed above, Plaintiff has neither
20 included the "2011 Order" in his complaint nor alleged any of its terms. Further, Arizona
21 law provides no cause of action for wrongful foreclosure. *Cervantes v. Countrywide*
22 *Home Loans, Inc.*, 656 F.3d 1034, 1043 (9th Cir. 2011) ("Arizona state courts have not
23 yet recognized a wrongful foreclosure cause of action."). The Court will therefore
24 dismiss Count Fourteen.

Dated this 21st day of October, 2013.

David G. Campbell
United States District Judge